

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: July 24, 1997

Case No. 94 INA 633

In the Matter of:

GOLD RIVER CONSTRUCTION COMPANY,
Employer

on behalf of

BRUNO JOHANN DARZNIK,
Alien

Appearance: Ronald Gold, Esq., of Glendale, California

Before: Holmes, Neusner and Vittone
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U. S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (CFR).

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions

of United States workers similarly employed.¹

STATEMENT OF THE CASE

On September 23, 1993, the Employer filed an application (ETA 750A) to permit the permanent employment of the Alien as a Construction Project Manager with the following duties:

Responsible for construction project supervision. Specific job duties include creating computerized project schedules, monitoring the schedule and available resources, carrying out feasible. (sic) studies on property developments, communicating with clients and investors, and preparing agreements and contract documents. Observe work in progress to ensure that procedures (sic) followed and materials used conform to specifications. Record quantities of materials received or used during specified periods. Maintain daily log of construction and inspection activities and compare progress reports. Compute monthly estimates of work.

The minimum qualifications sought initially by the Employer of applicants for the position were a Bachelor's or equivalent degree in Engineering Technology and three years experience in the job offered which must include development and maintenance of computer software for cost estimation, project management, project scheduling and resource allocation applications as well as the ability to utilize IBM-compatible computer systems and related peripherals such as plotters and printers.

It was noted in the ETA 750A that the Alien would report to the "Co-Owner" and would be supervising a variable number of employees. The Declaration of Employer section of the form bears the signature of Dr. Abolfath Hosseinyoun, who is identified as "Co-Owner."

The application was accompanied by a Statement of Qualifications of Alien (ETA 750B) and a resume in which the Alien reported that he received a Bachelor's degree in Civil Engineering in 1953 and had been employed in various engineering jobs since that time.² While living in Iran he worked from May 1973 to July 1974 as a Chief Civil Engineer designing township infrastructures with the utilization of computerized project management methods and design techniques; from October 1974 to February 1976 he was a Consulting Engineer designing freeway interchanges and service areas; and from February 1976 to December 1976 he worked as a Project Construction Manager with

¹This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 CFR § 656.27(c).

²A national of West Germany, the Alien currently lives in Malibu, California under a E-2 visa.

responsibility for carrying out project management through use of computerized project management techniques during construction of a new refrigeration appliance factory. AF 209-210.

On March 19, 1993, the California Employment Development Department ("EDD"), the state agency responsible for the initial processing of the application, notified the Employer that the alien did not appear to have the work experience background required by the job offer and that, if any relevant work experience was omitted, it should be added. The Employer was instructed also that Civil Engineering should be added to the ETA 750A as a major field of study and that a copy of the Employer's state contractor's license should be provided.

Under the date of May 3, 1993, counsel for the Employer indicated that they were submitting the following documents on behalf of the Employer: amendment letter from the employer, in duplicate; addendum to form ETA 750B, duly signed by the Alien, in duplicate; letters from employer regarding Mr. Darznik's experience in computers related to construction project management. The Employer's letter is signed by Dr. Hosseinyoun as "Co-Owner" and notes the firm's contracting license number and that the ETA 750A was being amended to change the educational requirement to Bachelor Degree in Civil Engineering. The amended ETA 750B notes that the Alien was self-employed from January 1977 as a Consulting Engineer performing the following work:

Plan layouts and industrial machinery. Advise on engineering economics, production planning and control. Feasibility studies for implementation of computerized manufacturing.

The record includes letters of recommendation from employers of the Alien before January 1977. Also included are letters from two Mexican company reporting that the Alien was a Consulting Engineer for their saw mill businesses from January 1977 to May 1985, and from June 1985 to February 1993, when he provided engineering services in transportation, plant layout, and industrial/portable sawmill machinery, including feasibility studies for the implementation of computerized manufacturing procedures.

The Employer placed the following advertisement for the position which appeared under the heading "770 Job Opportunities" between the headings "890 Autos Wanted" and "900 Public Notices."

MANAGER, CONSTRUCTION PROJECT: Supr. Constr. Projects. Create computerized proj. scheds. Monitor sched. & avail. resources to carry out feasibility. Conduct study on property developments. Liaise w/clients & investors to prep. agreements/contracts. Observe work to assure conformance to specs. Record quantities of

materials received/used. Keep daily log of constr.-
/inspec. activities. Knowl. Of IBM p.c. applications
for cost estim. proj. mgmt. Scheduling & resource
allocation. B.S. Civil Eng'r. 3 yrs. exp.

The recruitment resulted in the referral of nine resumes from EDD to the Employer on June 9, 1993, including applications by David Meany and Robert Tonjes. Mr. Meany's resume showed that he had a Bachelor of Science degree in Civil Engineering, a Master of Science degree in Construction Management, a Master of Business Administration degree in Finance and a Master of Arts degree in Economics. He noted experience of over twenty years in construction and project management, which included project controls, contract documents, estimates and construction claims.³ Mr. Tonjes reported having both Bachelor and Master degrees in civil Engineering and 17 years experience in design and/or construction of commercial and residential projects.

Identifying himself as "Owner," Dr. Hosseinyoun reported in August 1993 that eight applicants were rejected for the position because of lack of the requisite education and/or experience. Employer interviewed Mr. Meany by telephone and rejected him because he had no experience with IBM-PC's and had no "up-to-date knowledge in computerized scheduling, cost estimating, CAD, etc." Mr. Tonjes was contacted and rejected on grounds that he had no experience in "newer computerized methods" in contract management and cost estimating. Also, the Employer attempted to contact U. S. applicant Paul Gifford by telephone on July 15, 1993, July 20, 1993, and August 10, 1993, when he was reached and advised the Employer that he had taken another job.

In a Follow-up Questionnaire directed to Mr. Meany by the EDD, he reported that when he was contacted by telephone by the Employer, he was not offered the job because the Employer wanted CAD experience. Mr. Meany said CAD experience was technician's work and not part of the duties of a project engineer. He then explained that his experience had included the supervision of CAD technicians, however. Mr. Meany then added that he was "very suspicious" about the job as the interviewer did not provide any background information and addressed his questions to the work of a technician rather than a professional engineer.

The questionnaire answers of Mr. Tonjes confirmed that he was contacted by the Employer during the second week of August. He then said it was the "strangest phone interview" he ever had, the Employer only asked a few questions about his computer background. It was the impression of Mr. Tonjes that the Employer was only concerned with his familiarity with certain software.

³Mr. Meany indicated that an expanded resume was available.

Mr. Gifford confirmed that he initially received a telephone message at home around August 15, 1993. He tried twice to return the message, but was told that the interviewer was rarely in the office. Finally, he left his phone number at work, where he was called the next day. Upon responding affirmatively to the question as to whether he was currently employed, the interviewer "immediately ended the conversation."

Notice of Findings. In the CO's October 19, 1993, Notice of Findings (NOF) he proposed to deny certification because the Employer had failed to document the following (1) that the job is truly open to U.S. workers; (2) that there are no unduly restrictive requirements; (3) that the U.S. workers were rejected for lawful, job-related reasons; (4) that U.S. workers were contacted promptly; and (5) that the job was advertised with particularity.

(1) The CO questioned whether the Alien had an ownership interest in the Employer in that the his E-2 visa indicated that he was a Treaty Investor and the ETA 750A showed that the business had a co-owner. The Employer was instructed that to rebut this finding, he should submit a copy of the application for the E-2 visa and documentation showing who is/are the co-owner(s) with Dr. Hosseinyoun. Additional documentation was requested as to any ownership held by the Alien.

(2) The CO said the requirement of experience in developing and maintaining computer hardware was a restrictive requirement as it was not a normal requirement for a construction manager. He noted that computer software could be purchased and that a project manager would not normally need prior experience developing a software system in order to be able to adapt or modify a software program to the company's needs. The Employer was directed to either justify the requirement on the basis of business necessity or delete the requirement and readvertise the position.

(3) As to the rejection of U.S. workers for other than lawful, job-related reasons, the CO found that the resumes of both Mr. Meany and Mr. Tonjes indicated that they were qualified for the position on the basis of their education and experience, and that they were improperly rejected for lack of specific computer experience, which was a criterion that was either unduly restrictive or was not required by the ETA 750A.

(4) The CO found that the Employer had failed to make timely contacts with U.S. workers as the resumes were sent to him on June 9, 1993, but he waited until the middle of August 1993 to contact the applicants. The Employer was then directed to submit copies of telephone bills showing when any toll phone calls were made to Mr. Tonjes and Mr. Gifford.

(5) Finally, the CO found that the advertisement for the

position had been mislabeled and placed in an obscure section of the newspaper, indicating that the job offer should have been printed under the heading for an Engineer. The CO said Employer could correct this deficiency by readvertising the job under an Engineer classification. The Employer was informed, however, that the readvertisement of the position would not justify the rejection of prior applicants for the position and that Employer was required to justify such rejections as well as to rebut all the other findings.

Rebuttal. On February 10, 1994, the Employer filed a rebuttal to the NOF. As to whether the Alien had an ownership interest in the business, Dr. Hosseinyoun said, "Please be advised that Mr. Bruno Darznik holds to (sic) interest in my company, nor is he related to me or any other person in my company." Dr. Hosseinyoun then said he was deleting the restrictive requirement of "experience in developing and maintaining the computer software used on the job and observed that he had readvertised the position without this requirement.

To justify the rejection of Mr. Meany, Employer claimed that the applicant was unable to answer questions on computerized cost estimating and scheduling, that his company "prides itself in the use of computerized state-of-the-art software programs which are more conducive to its business needs," and, accordingly, "it is essential to the continued success of my company to find individuals who are experienced in newer technology methods and procedures." (Emphasis added.) The Employer then claimed that Mr. Tonges was not hired also because he lacked knowledge and experience in computerized cost estimating and scheduling.

As to the Employer's failure to contact U. S. applicants in a timely manner, the Employer submitted a copy of his telephone bill, which he said verifies that a telephone call was made to Mr. Gifford on July 20, 1993, clearly within the allowed timely period.⁴ He claimed further that, as Mr. Tonges resided in the same local area as the Employer's business, calls to him can not be verified by a telephone bill, and that "notes" show that he was contacted in a "timely" manner.

Also included with the rebuttal was a recruitment report in which the Employer noted that all 20 of the applicants generated by the new advertisement had been rejected for the position on

⁴The telephone bill is for the period of July 12 to 22 1993 and shows a charge for a one minute call on July 20, to the phone number listed on Mr. Gifford's resume.

the basis that they were either unqualified or unavailable.⁵

The letter summarizing Employer's arguments on rebuttal said,

For your information, Mr. Darznik does not now own, nor has he ever owned any interest in Gold River Construction Co., nor does he have any relatives which own an interest in the company.

In 1978, Mr. Darznik entered the U.S. as a B-2 visitor. In 1979, he changed his status to E-2 based on his investment in "Casa Buena Motel". Mr Darznik was granted this E-2 visa in order that he could direct and manage his investment. In 1985, Mr. Darznik sold the motel, but continues to hold a small percentage of interest in this business.

Attached please find copies of the grant deed for "Casa Buena Motel" for your reference. (Exhibit A).⁶

Final Determination The CO found that the Employer had not satisfactorily rebutted the NOF on the timeliness of his contact with the U. S. applicants to his initial recruitment, that he did not show that he had rejected applicants Meany and Tonjes for lawful, job-related reasons, and that he failed to prove that the Alien was not involved in the ownership or control of the company. Accordingly, the CO's Final Determination denied the Employer's application for certification. After the Employer requested a review of the denial, the Appellate File ("AF") was transmitted to the Board for this appeal.

DISCUSSION

(1) Sufficiency of Recruitment Effort. The Board has held repeatedly that although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. Cf., e.g., **H.C.**

⁵After obtaining extensions of time to permit a new recruitment the Employer later readvertised the position as follows: "**Engineer**, Senior - Construction Project Manager/Estimator, Construction Manager: Supervise construction projects. Formulate computerized project scheduling. Monitor schedules and availability of resources. Conduct studies of developments & communicate w/clients & investors. Agreement & contract prep. Keep records of materials. Maintain daily logs of construc. & inspection activities. Must have exp. in computerized cost estimating and scheduling. COST CODE DATABASE in CSI FORMAT AND CAD. B.S.Degree Civil Eng'r. 3 yrs. Exp..." As a result of Employer's new recruitment effort, twenty additional job applicants were referred for the Employer's consideration.

⁶Exhibit A indicates that in April 1989, the Alien and his wife, through a "straw party," deeded property in the City of Corte Madera to B & K Patel, husband and wife.

LaMarche Enterprises, Inc., 87-INA-607 (Oct 27, 1988). The Employer must make efforts to contact qualified U.S. applicants in a timely manner after receipt of their resumes from the state agency, and its failure to do so indicates a failure to recruit in good faith. **Loma Linda Foods, Inc.**, 89-INA-289 (Nov. 26, 1991)(en banc). While the Board has not established any hard and fast rule as to what constitutes an excessive amount of contact time, initial contacts after three weeks or more generally have been considered excessive. Cf., e.g., **Rancho Liquor**, 90-INA-520 (Dec. 3, 1991)(21 days); **Hydromach**, 89-INA-329 (Aug. 15, 1990) (30 days); **Foster Electrical Service, Inc** 88-INA-284 (June 30, 1989)(over one month). Lesser periods have not been considered excessive. Cf., e.g., **Lee & Chiu Design Group**, 88-INA-328 (Dec. 20, 1998)(en banc)(16-20 days), **Fair Weather Marine, Inc.**, 88-INA-331(Sept. 21, 1989)(19 days), **National Industries for the Severely Handicapped, Inc.** 88-INA-388(Feb. 13, 1990)(two to three weeks). The Board has held also that a good faith effort to recruit may, in some circumstances, require attempts to contact qualified applicants by both telephone and mail. **Diana Mock**, 88-INA-255 (Apr. 9, 1990).

As noted in the Final Determination, Dr. Hosseinyoun agreed in his initial recruitment report that he first attempted to contact applicant Gifford on July 15, 1993, which was then past thirty days from the transmittal of the resumes by the EDD. His next attempt was on July 20, 1993. As the call to Mr. Gifford's phone number that the telephone bill shows occurred on July 20, 1993, was for one minute (or less) and the call obviously does not document that a contact was made at that time. Yet, Employer waited for three more weeks before he again tried to contact this applicant. Significantly, the Employer made no attempt to reach Mr. Gifford by mail before that point. As a result Mr. Gifford became unavailable to the Employer because he became employed in the interim. Clearly, this record documents Employer's lack of good faith recruitment efforts.

(2) Rejection of U. S. Applicants Meany and Tonjes. 20 CFR §§ 656.21(b)(6) provides that

If U.S. workers have applied for the job opportunity, the employer shall document that they have been rejected solely for lawful job-related reasons.

20 CFR §656.24(b)(2)(ii) further provides that

The Certifying officer shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. ...

This subsection applies where an applicant is competent to perform the job duties with a nominal period of on-the-job training even though he or she does not possess all of the stated qualifications. **Minecraft Software, Inc.**, 90-INA-328 (Oct. 2, 1991). It should be noted also that under 20 CFR § 656.21(b)(6) the Employer cannot require more stringent qualifications of U.S. applicants than it requires of the alien. **ERF Inc., d/b/a Bayside Motor Inn**, 89-INA-105 (Feb. 14, 1990).

Discussion

We agree with the CO that both Mr. Meany and Mr. Tonjes have substantial educational credentials and significant experience in the construction management field. The Employer has attempted to justify their rejection, however, by citing on their purported lack of experience in the "newer" computer technology which the company uses. This argument is without merit.

First, when it is considered that computer technology is rapidly changing, it is doubtful that any applicant would have three years experience in the Employer's newer programs. Second, it appears likely that workers with the engineering backgrounds possessed by the two U. S. applicants can master the Employer's computer programs within a brief training period. Finally, there is nothing in this record that suggests that the Alien has the computer experience allegedly sought by the Employer. His listed experience in using computers for construction work occurred in the 1970's, which hardly would involve the Employer's up-to-date programs. The Alien's most recent experience involved computers associated with the lumbering industry, and not the construction industry. Moreover, the Alien's resume does not even mention the computerized cost estimating experience sought by the Employer as a critical job qualification. It follows that the Employer did not establish that Mr. Meany or Mr. Tonjes was rejected for lawful, job-related reasons.

(3) Alien Ownership or Control. Under 20 CFR § 656.20(c)(8) the Employer must show that the job has been and is clearly open to U. S. workers and that a bona fide job opportunity exists. Under this regulation it has been held that the lack such an opportunity may be found where the Alien has an ownership interest in the company, is related to owners of the company, and/or is otherwise in the position to control or to influence hiring decisions regarding the job offer. **Modular Container**, 89-INA-228 (July 16, 1991)(en banc).

The earliest documentation in the record referred to Dr. Hosseinyoun as a supposedly, all important, "co-owner" of the company on at least three occasions, two of which identifications appear under his signature. This, coupled with the Alien's visa status as a treaty investor, properly gave the CO concern that

there may be an ownership interest in the company by the Alien. Dr. Hosseinyoun has declined to identify any co-owner, however. He now claims that he is the sole proprietor of the company, and he failed to offer timely documentation in support of this allegation in his rebuttal to the NOF. A copy of Fictitious Business Name Statement showing that Gold River Contractors was conducted by Dr. Hosseinioum as an individual was submitted with the request for review. The Board has held that it has authority to consider only that evidence which was part of the record at the time the Final Determination was issued. **Capriccio's Restaurant**, 90-INA-480 (Jan. 7, 1992). In this case, the value of such documentation is further diminished by the fact that it was not filed until December 9, 1993 and shows that the business was to commence on that date. The Employer's state license as a contractor, which the EDD requested when this application was first filed, was not submitted until the Employer filed this request for the review of the Final Determination. When at last it arrived, it was found to be of little value to the employer's proof, as it was issued in the name of the company and did not reveal the names of any of the owners.

The representations of counsel concerning the Alien's alleged investments are unsupported by the statement of a person with actual knowledge of the facts (e.g., the Alien, or his purported purchasers) or by such authenticating documentation as copies of tax or other business records. Consequently, the lawyer's assertions are unreliable and they are rejected as evidence as to this issue. **Moda Linea, Inc.**, 90-INA-424 (Dec. 11, 1991).⁷ Finally, the only documentation that the Employer submitted is an instrument that failed to identify the nature of the property that was convey by the deed.

The Board concludes that for these reasons the CO properly denied certification in this case.

ORDER

The Certifying Officer's denial of labor certification is hereby affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

⁷The absence of any acknowledgment by the Alien in either his original or supplemental statement of qualifications that he was involved in the management of any motel business, however, tends to contradict and lends weight to the rejection of these assertions by Employer's attorney in this case.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 94-INA-633

GOLD RIVER CONSTRUCTION COMPANY, Employer
BRUNO JOHANN DARZNIK, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:			
	:	CONCUR	:	DISSENT	:	COMMENT	:
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_____	:	:	:	:	:	:	:
Holmes	:	:	:	:	:	:	:
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Thank you,

Judge Neusner

Date: June 2, 1997

FREDERICK D. NEUSNER
Administrative Law Judge